IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24071-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
MICHELLE LYNETTE BAECHLER,	)	
Appellant.	)	**UNPUBLISHED OPINION**

SWEENEY, C.J.—This appeal follows a conviction for escape in the first degree. The appellant failed to report to a county jail on a date ordered by the court. Here on appeal, she argues that her lawyer was ineffective because the essential proof for her conviction (that she was the person named in a former judgment and sentence) came in through her case and not the State's case. We read the record differently. Next, she argues that her affirmative defense (that she could not report to jail due to medical problems) was established as a matter of law if the State's burden was to disprove the claim beyond a reasonable doubt. There is ample evidence from which a jury could have failed to be persuaded of her defense. We therefore affirm her conviction.

FACTS

Michelle Lynette Baechler pleaded guilty to obtaining a controlled substance through fraud. The court's amended judgment and sentence ordered that she report to jail on October 16, 2004. She did not report to jail until December 9, 2004.

The State charged Ms. Baechler with escape in the first degree. Ms. Baechler offered an affirmative defense, essentially of her inability to report to jail because of health problems. A jury convicted her.

DISCUSSION

Ineffective Assistance of Counsel

We review a claim of ineffective assistance of counsel de novo. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). We begin with a strong presumption that defense counsel's performance was effective. *Id.* A defendant has the burden to overcome that presumption. *State v. McFarland*, 127 Wn.2d 322, 335, 337, 899 P.2d 1251 (1995).

Showing ineffective assistance of counsel is a two step process. *Id.* at 334-35. The defendant must first show that "defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances." *Id.* This must be shown based upon the trial record. *Id.* at 335. The defendant must also show that he or she was prejudiced by the deficient representation.

Id. at 334-35, 337. There must be "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 334-35.

Ms. Baechler argues that her lawyer made mistakes at trial that aided the State. She says the State, in its case in chief, failed to show that the person named in a certified copy of a former judgment and sentence was her. She says that evidence did not come in until her case in chief. So the court would have dismissed the case if her lawyer had moved to dismiss the prosecution at the close of the State's case.

A prior felony conviction is an element of the crime for escape in the first degree. RCW 9A.76.110(1). "A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony." *Id.* The State must show independent evidence of the identity of an individual named in a former judgment and sentence. *State v. Hunter*, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981). A copy of the former judgment and sentence alone is not enough:

> Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action.

Id.

The State here submitted the appropriate certified copy of Ms. Baechler's former amended judgment and sentence.

It then introduced the testimony of Officer Patrick Rollosson. He is a corrections officer for the county sheriff's office. He insures "that the judgment and sentences that are issued by the court are complied with." Report of Proceedings (RP) at 6. Officer Rollosson testified that Ms. Baechler was supposed to report to jail, under her amended judgment and sentence, on October 16, 2004. Ms. Baechler did not report to jail until December 9. Officer Rollosson talked to Ms. Baechler after she reported to jail. He "told her that [he] had previously submitted an escape request for her." *Id.* at 11. Officer Rollosson identified the woman at the defense table (Ms. Baechler) as the defendant named in the former amended judgment and sentence. *Id.* at 12.

This is independent evidence of the identity of the individual named in the former amended judgment and sentence. *Hunter*, 29 Wn. App. at 221. Ms. Baechler has not then shown that defense counsel was deficient. *McFarland*, 127 Wn.2d at 335-36.

Sufficient Evidence Affirmative Defense

We review a challenge to the sufficiency of the evidence of an affirmative defense in a light most favorable to the State. *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996). We will affirm where "a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence." *Id.*; *State v. Riker*, 123

Wn.2d 351, 368, 869 P.2d 43 (1994) ("[A]n affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proved by a preponderance of the evidence.").

Ms. Baechler had to show, and the jury had to believe, three things to acquit her based on her affirmative defense: (1) she had been subject to "uncontrollable circumstances [that] prevented [her] . . . from returning to custody or to the detention facility"; (2) she did not "contribute to the creation of [the uncontrollable] circumstances in reckless disregard of the requirement to . . . return"; and (3) she "returned to custody or the detention facility as soon as [the uncontrollable] circumstances ceased to exist." RCW 9A.76.110(2).

Ms. Baechler argues that she established this affirmative defense. She urges us to apply a "reasonable doubt" standard.

Ms. Baechler's argument confuses two elements of the burden of proof—the burden of production and the burden of persuasion. "'The phrase "substantial evidence" describes the burden of production in all cases, while the phrase "beyond a reasonable doubt" describes the burden of persuasion in criminal cases. The burden of production is applied by the judge, while the burden of persuasion is applied by the jury.'" *State v. Dolan*, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003) (quoting *State v. Huff*, 64 Wn. App. 641, 655, 826 P.2d 698 (1992)). We do not review the persuasiveness of Ms. Baechler's

affirmative defense. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The persuasiveness of that evidence is a question for the trier of fact, here the jury. *Id.*

Here, the court ordered Ms. Baechler to report to jail on October 16, 2004. She reported on December 9. Ms. Baechler testified that medical problems prevented her from reporting to jail. She testified that she suffered from an eye injury caused by toxic paint fumes on October 14. She called "Poison Control, doctors, [and] hospitals" to ask about treatment. RP at 19. Ms. Baechler treated herself with teardrops and pads to cover her eyes. She did not see a doctor or other medical professional about her eyes.

Ms. Baechler knew the jail had a medical facility. She testified that her experience with the medical facility "has been less than professional and merely adequate." *Id.* at 21. She testified that she "would not put the care of [her] eyesight in their hands." *Id.* She also testified that she planned to return to jail "[a]s soon as [she] was secure in the fact that [her] eyes were going to be OK." *Id.* Ms. Baechler did not call the jail to inform officials that she would not be reporting to jail.

Ms. Baechler suffered from a second injury on December 2. She fell off a ladder and injured her back. Ms. Baechler went to the emergency room. She also saw a doctor on December 6. Ms. Baechler talked to both the hospital and the doctor about her eyes. Ms. Baechler was not hospitalized "as a result of any of [her] medical problems." *Id.* at 32. The doctor gave her a list of specialists to see for her back.

Amy Davis is a close friend of Ms. Baechler. She testified that Ms. Baechler suffered from eye problems "about over a week." *Id.* at 35, 38. She was not aware of any reason that would have prevented Ms. Baechler from reporting to jail in mid November.

Ms. Baechler met her burden of production. She presented sufficient evidence to support her affirmative defense. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *Dolan*, 118 Wn. App. at 331-32. And the court instructed the jury on that defense. The jury simply rejected that defense. And that was its prerogative. *Walton*, 64 Wn. App. at 415-16.

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, C.J.

WE CONCUR:

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Schultheis, J.

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Kato, J.